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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 773

MANDELL, SPECTOR, RUDOLPH CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 11–20) is reported at 364 F. 2d 889. The decisions and orders of the Judicial Officer of the Department of Agriculture (R. 594a) [1] are reported at 24 A.D. 651, 897, 1025.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1966. A timely petition for rehearing was denied on September 23, 1966. The petition for a writ of certiorari was filed on November 15, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." refers to the two-volume Joint Appendix in the court of appeals, nine copies of which petitioner has filed with the Clerk of this Court.

QUESTION PRESENTED

Whether the disciplinary proceedings instituted against petitioner were consistent with the provision of Section 9(b) of the Administrative Procedure Act which accords licensees a prior opportunity to rectify non-willful violations of law.

STATUTE INVOLVED

Section 9(b) of the Administrative Procedure Act (hereinafter "APA"), 60 Stat. 242, 5 U.S.C. 1008(b), provides, in relevant part, as follows:

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.[2]

STATEMENT

Petitioner corporation was licensed under the Perishable Agricultural Commodities Act of 1930 (hereinafter "PACA")[3] to do business in interstate commerce as a commission merchant, broker, and dealer

[2] As a result of the recent revision and enactment into positive law of Title 5 of the United States Code (Public Law 89-554, 80 Stat. 378), Section 9(b) of the APA is now codified as 5 U.S.C. 558(c).

[3] 46 Stat. 531, as amended, 7 U.S.C. 499a–499s.

in fresh fruits and vegetables (R. 3a, 19a). The PACA makes it unlawful for licensees " * * * to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction * * * to the person with whom such transaction is had * * *" (7 U.S.C. 499b(4)). In addition, the PACA provides for the filing of a complaint with the Secretary of Agriculture by anyone asserting a violation, and authorizes an investigation by the Secretary of the matter complained of which may, if the facts so warrant, lead to a hearing on whether a violation has in fact occurred (7 U.S.C. 499f) and what sanctions, if any, should be imposed on the violator (7 U.S.C. 499g, 499h).

In early 1961, as a result of a complaint of underpayments by Hicks Produce, Inc., the Department of Agriculture began an investigation regarding 57 shipments of tomatoes which Hicks had consigned to petitioner for its account during the period between January and May 1961 (R. 397a). The Department's detailed investigation revealed that the prices actually paid by some of the purchasers of the tomatoes were higher than the prices shown on petitioner's sales tickets, and that, while petitioner collected the higher amounts from the purchasers, it accounted to Hicks on the basis of the lower sales ticket prices (R. 397a–407a). The investigation also revealed that petitioner charged Hicks for cartage on a large sale of tomatoes when, in fact, the tomatoes were transported in Hicks' own truck and no cartage expense was incurred (R.

400a–401a). After the completion of the investigation, a check in the amount of the total underpayment, $1,676.20, payable to Hicks, was issued by petitioner and given to the Department's representative (R. 52a–53a).

The Department then served an informal disciplinary complaint on petitioner and began a "spot-check" of its records to determine whether the Hicks case was an isolated instance of underpayments or, rather, a manifestation of a regular practice (R. 53a). The Department's investigators selected at random for detailed examination 35 shipments which petitioner received from shippers other than Hicks during the period October 4, 1960 through April 12, 1962 (R. 318a–394a). This second investigation revealed discrepancies in all 35 of the cases examined: underpayments to shippers totalled $4,174.88 in 28 cases, and overpayments totalled $318.38 in 7 cases (R. 395a).[4] When the investigators compared the accountings which petitioner rendered to shippers with petitioner's own sales records, they found no relationship between the quantities and prices on the two types of documents (*e.g.*, R. 352a). The investigators also found that, in a number of cases, instead of notifying a shipper when a substantial portion of a shipment had been badly damaged in transit, peti-

[4] In several instances petitioner's records contained notations which indicated that overpayments were deliberately made (*e.g.*, R. 336a, 391a).

tioner falsely reported sales of the damaged merchandise at fictitious prices, took its commissions on those fictitious amounts, and collected on the damage claims from the railroads (*e.g.*, R. 213a–214a, 369a–370a). Additionally, it was disclosed that petitioner frequently charged a shipper for cartage from its depot to its store when, in fact, no such expense had been incurred (*e.g.*, R. 358a, 363a, 370a). Shortly after completion of this second investigation, the Department's investigators met with petitioner's officers and their attorney and advised them of the results of their investigation (R. 284a–285a).

On November 27, 1962, some six months later, the Department wrote to petitioner, summarizing the results of both investigations and noting that petitioner had been requested to issue checks to shippers in restitution of the underpayments but that it had declined to do so (R. 426a–428a).[4] The Department's letter stated that petitioner's violations were sufficient grounds to institute disciplinary proceedings which could result in revocation or suspension of petitioner's license, and concluded (R. 428a):

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[4] In its petition for rehearing in the court below, petitioner relied for the first time on the fact that it had previously offered to make restitution of the underpayments found in the 35 shipments on the condition that the Department terminate the informal disciplinary proceedings. The Department had refused to accept this offer because of the seriousness and widespread nature of petitioner's discovered violations.

> This letter is addressed to you in accordance with the requirements of Section 9(b) of the Administrative Procedure Act (5 USC 1008i(b)) [sic] and you are afforded this opportunity to furnish us with any explanation or comments you may have pertaining to the transactions and the allegations listed herein.

Petitioner's attorney replied to this letter several weeks later. He stated that petitioner had properly accounted to shippers and kept adequate records, and that his "client feels very strongly as to its innocence of the charges and that it has not been guilty of any wilful or deliberate underpayments or other violations of the law as charged" (R. 429a–431a). He also stated (R. 430a):

> It is true that a request has been made for payment of these underpayments, but my client feels at this time that there is no liability therefor. Under the circumstances, my client is desirous of defending any disciplinary action which your department may care to institute. * * *

Following the filing of a formal complaint, and after presentation of the evidence, the Hearing Examiner found that petitioner "in its accountings to shippers conjured up false and fictitious figures and amounts in a manner so blatant that its conduct in this regard can only be described as callous and cynical" (R. 570a). He stated that petitioner had committed "repeated, flagrant, and wilful" violations of Section 2(4) of the PACA[*] in failing truly and correctly to account and make payment to its con-

[*] 7 U.S.C. 499b(4).

signors and joint account partners, and recommended that petitioner's license be revoked (*ibid.*).

Reviewing the Hearing Examiner's recommendation, pursuant to authority delegated to him by the Secretary of Agriculture, the Department's Judicial Officer determined that the record disclosed that petitioner had "repeatedly and flagrantly" violated the PACA by failing truly and correctly to account and make payment to its consignors and joint account partners (R. 637a). He concluded that revocation of petitioner's license was justified since petitioner's violations were "the most serious and flagrant type possible under the act" and petitioner had "demonstrated a deliberate disregard" of its fiduciary obligations (R. 639a–640a). He ruled, however, that petitioner's license, instead of being revoked, should only be suspended for 90 days since this was the sanction which had been imposed for similar violations in other cases (R. 640a).

With respect to the question of whether petitioner's violations of the PACA were "willful," the Judicial Officer expressly stated that, if necessary, he would have had "no difficulty" in finding willfulness (R. 639a). He went on to determine, however, that it was not necessary to base the suspension on that ground. He pointed out that the Department's warning letter of November 27, 1962 to petitioner (*supra*, pp. 5–6) fulfilled the notice requirements of Section 9(b) of the APA. He stated, however, that since petitioner thereafter failed to "demonstrate or achieve compliance" with the PACA, the suspension of its license need not be based on the willfulness of the violations (R. 639a).

In its unanimous opinion affirming the Judicial Officer's order, the court of appeals held that the evidence supported the administrative findings, and that Section 9(b) of the APA "was fully complied with here by reason of the fact that the petitioner was notified by letter of the violations and given an opportunity to redress its misconduct, but it failed to so do" (Pet. App. 20).

ARGUMENT

Section 9(b) of the Administrative Procedure Act provides that, in the case of non-willful violations of law, the agency may not institute disciplinary proceedings until it has notified the licensee in writing of his alleged violations and accorded him an opportunity to "demonstrate or achieve compliance" with the law. Contrary to petitioner's assertion, the suspension of its license for repeated and flagrant violations of the PACA was fully consistent with Section 9(b). As the facts plainly show (*supra*, pp. 5–6), as petitioner indeed concedes, and as the court below found (Pet. App. 20), the Department of Agriculture sent petitioner a warning letter which fulfilled the notice requirements of Section 9(b). Petitioner thereafter neither demonstrated nor achieved compliance with the requirement of the PACA.

In addition, while not deeming it necessary to rest his decision on the point, the Department's Judicial Officer explicitly stated his conviction that the record demonstrated that the violations were willful. Petitioner makes no attempt to show that this conviction was unfounded. The decision of the court below was plainly correct, and there is no conflict

among circuits on the question presented. Accordingly, further review by this Court is not warranted.

1. As properly concluded by the court of appeals the Department's letter of November 27, 1962 (*supra*, pp. 5–6) clearly fulfilled the notice requirements of Section 9(b), since it notified petitioner of the charges against it and the possibility of disciplinary proceedings.[7]

Petitioner does not claim that it thereafter "demonstrated compliance" with the PACA. The only conceivable manner in which petitioner could undo the results of its false accountings and underpayments to shippers and thereby "achieve compliance" with the PACA would be by making restitution to the shippers.[8] Although petitioner paid $1,676.20 to

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[7] See U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 91 (1947): "While the warning must be in writing, it need not take any special form." See also *Shuck* v. *Securities and Exchange Commission*, 264 F. 2d 358, 360 (C.A. D.C.).

[8] In its brief in the court of appeals (pp. 44–45), the government asserted at one point that petitioner could not, as a practical matter, "achieve compliance" with the PACA, since it could not undo the erroneous accountings which it had rendered or rectify the results of its improper record-keeping in the past. In oral argument, however, the government stated that, in any event, petitioner had not "achieved compliance" since it had failed to make restitution of the discovered underpayments. The court of appeals evidently based its decision on this latter ground when it held that Section 9(b) was complied with since "petitioner was notified by letter of the violations and given an opportunity to redress its misconduct, but it failed to so do" (Pet. App. 20). Whether the government's earlier assertion in its brief is correct or not is irrelevant, since it was not accepted or relied upon by the court below.

Hicks Produce, Inc. (*supra*, p. 4), it has never made restitution of the underpayments discovered in the second investigation, *i.e.*, those relating to the other 35 shipments (*ibid.*). Petitioner only offered to pay these amounts on the condition that the Department dismiss the informal disciplinary proceedings initiated against it (see note 5, *supra*). In view of the serious and widespread nature of petitioner's violations, it is not surprising that this offer was rejected by the Department.[9] Subsequently, petitioner replied to the Department's warning letter of November 27, 1962 by denying any violations or underpayments and refusing to make restitution (*supra*, p. 6). Even assuming that petitioner could feasibly undo the results of its erroneous accountings, and thereby "achieve compliance" with the PACA, by making restitution of its underpayments, it has never in fact done so.[10]

2. In view of the foregoing, the Judicial Officer was correct in his belief that it was not necessary to base the suspension order upon the willfulness of the violations. Nevertheless, he went on to state that, if willfulness were an essential ingredient, he would

[9] Because of the conditional nature of petitioner's offer to make restitution, which the Department, under the circumstances, could properly and did reject, petitioner's assertion (Pet. 2, 4) that it tendered repayment of the alleged underpayments is inaccurate and misleading.

[10] Since discrepancies were found in every one of the 35 shipments which the investigators selected at random for examination, it is clear that there were underpayments in numerous other cases (see note 11, *infra*). Yet petitioner, to our knowledge, has never audited its records to determine the amounts underpaid in those other cases, and has never offered to make restitution of the amounts which would be so determined.

have "no difficulty" in finding (on the basis of the evidence of petitioner's repeated, flagrant violations) that the misconduct was willful (*supra*, p. 7). For purposes here, this was tantamount to a finding of willfulness, and, without a doubt, is amply supported by the record.

The Department of Agriculture's detailed investigations of petitioner's activities revealed that, in total disregard of its own records, petitioner repeatedly rendered false accountings and made underpayments to shippers (*supra*, pp. 3–5).[11] Findings to this effect were made by the Hearing Examiner and the Judicial Officer (*supra*, pp. 6, 7), were sustained by

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[11] Petitioner states that it only underpaid $3,856 over a period of 18 months in a business which grosses $5 million yearly (Pet. 4, n.1). The $5 million figure relates to income from all operations, not just consigned and joint account transactions. Petitioner handled about 2,300 shipments of produce per year, with 25 to 35 percent of these shipments being handled as consigned or joint account produce (R. 630a). Thus, approximately 575 to 800 shipments were handled yearly on consignment or joint account. In the second investigation 35 shipments were selected at random for detailed examination; discrepancies were discovered in all 35 cases (*supra*, p. 4). From the discussion above, it is obvious that the transactions examined involved approximately only 4 to 6 percent of petitioner's total yearly consignment and joint account business. Without intimating that discrepancies existed with respect to all of petitioner's shipments, since found in all 35 cases actually examined, the total amount of petitioner's yearly underpayments to its consignors and joint account partners, under any fair estimate, in all likelihood substantially exceeded the amounts involved in the 35 random cases which were examined by the Department.

Petitioner's deliberate overpayment of shippers in some instances (*supra*, p. 4), it should be noted, is entirely consistent with its overall scheme of defrauding shippers. See note 4, *supra*.

the court of appeals (*supra*, p. 8), and have not been challenged here by petitioner. On the basis of these findings, petitioner's utter disregard of its fiduciary obligations (see R. 631a–633a; 639a–640a) can properly be viewed as constituting "willful" violations of the PACA. See *United States* v. *Illinois Central R. Co.*, 303 U.S. 239, 242–243; *Eastern Produce Co.* v. *Benson*, 278 F. 2d 606, 609 (C.A. 3); *Capitol Packing Co.* v. *United States*, 350 F. 2d 67, 78–79 (C.A. 10).[12] Section 9(b) of the APA (*supra*, p. 2) of course specifically excepts "cases of willfulness" from its "opportunity to * * * achieve compliance" language.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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DECEMBER 1966.

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[12] The accuracy of petitioner's assertion (Pet. 5) that the effect of the suspension, heretofore not executed, will be to destroy its business has never been admitted by the government, and no finding as to this was made below. Insofar as we can determine, the assertion is wholly unfounded.

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